



**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT**

**IN THE MATTER OF THE AGENCY
INITIATED MODIFICATION OF THE
HAZARDOUS WASTE FACILITY PERMIT
FOR THE WASTE ISOLATION PILOT PLANT
CARLSBAD, NEW MEXICO
EPA ID NO. NM 4890139088**

No. HWB 04-01(M)

**RESPONSE BY NMED
HAZARDOUS WASTE BUREAU
TO PERMITTEES' MOTION TO DISMISS**

On March 26, 2004, the Department of Energy (DOE) and Washington TRU Solutions, LLC (the Permittees) filed a Motion to Dismiss this proceeding with the New Mexico Environment Department (NMED). In deciding the merits of a motion to dismiss, the trier must accept facts alleged by the claimant as true. In its motion, however, the Permittees have failed to argue based upon the facts alleged by NMED. Instead, the Permittees have asserted their disagreement with the facts alleged by NMED, ignored those facts, or alleged other facts. The Permittees' Motion to Dismiss should be denied on this basis alone. On the merits, NMED is asserting jurisdiction only over the hazardous component of mixed waste, where jurisdiction unarguably exists. In addition, NMED meets the requirement for an agency initiated permit modification under 40 CFR §270.41.

Finally, the Permittees state that NMED did not file a Notice of Intent to Present Technical Testimony. The Permittees are incorrect about this as well. Attached as Exhibit 1 is a conformed copy of the NMED Notice of Intent to Present Technical Testimony, which was timely filed on March 8, 2004.



I. STANDARD OF REVIEW

In making their Motion to Dismiss, the Permittees analogize to New Mexico Rules of Civil Procedure 1-012.B(1) (lack of jurisdiction over subject matter) and 1-012.B(6) (failure to state a claim upon which relief can be granted). As the Permittees recognize, in deciding the merits of a motion to dismiss, the trier must accept facts alleged by the claimant. *Environmental Control, Inc. v. City of Santa Fe*, 2002-NMAC-003, ¶6, 131 N.M. 450. A motion to dismiss is properly granted only when it appears that plaintiff cannot recover under any state of facts provable under the claim. *C&H Construction and Pav., Inc. v. Foundation Reserve Ins. Co.*, 85 N.M. 374, 512 P. 2d 947 (1973).

In its motion, however, the Permittees have failed to argue based upon the facts alleged by NMED. Instead, the Permittees have asserted their disagreement with the facts alleged by NMED, ignored those facts, or alleged other facts. The Permittees Motion to Dismiss should be denied on this basis alone.

An objective review of the record and of the Permittees motion will show that NMED has alleged facts that will support the jurisdiction of NMED as well as a determination that the Waste Isolation Pilot Plant (WIPP) permit should be modified.

II. ARGUMENT

A. NMED Has The Authority To Regulate The Hazardous Component Of Mixed Waste.

The Permittees argue that NMED does not have the jurisdiction, pursuant to its RCRA authorization, to regulate the “radioactive component of mixed waste.” Motion to Dismiss, p. 2. This argument is based on the premise that the Atomic Energy Act, which

provides for federal regulation of “source, special nuclear or byproduct material,” preempts state regulation of such materials. 42 U.S.C. §2011 et seq. Though NMED believes that the legal interpretation by the Permittees regarding NMED’s jurisdiction over radioactive waste is overly restrictive¹, the issue does not need to be squarely addressed or decided because NMED is not attempting to regulate any radioactive component of mixed waste.

NMED has the authority, under the Resource Conservation and Recovery Act of 1976 (RCRA, 42 U.S.C. 6901 to 6992k), to regulate the hazardous component of mixed waste. Mixed waste is defined as “waste that contains both hazardous and source, special nuclear, or byproduct material subject to the Atomic Energy Act of 1954.” 42 U.S.C. §6903(41) (1994). Because mixed waste contains hazardous constituents, it is regulated under RCRA to the extent that it contains hazardous constituents. 40 CFR 264.1. New Mexico is authorized by EPA to administer RCRA (40 CFR 272.1601) and has adopted relevant portions of 40 CFR §264. §20.4.1.500 NMAC. Pursuant to RCRA and the New Mexico Hazardous Waste Act (NMSA 1978, Sections 74-4-1 to 74-4-14) NMED issued a Hazardous Waste Facility Permit (HWFP or permit) to the Permittees on October 27, 1999. The federal government has waived its arguments of sovereign immunity with regard to state regulated hazardous waste under RCRA. 42 U.S.C. §6961(a).

NMED is not arguing, as the Permittees claim, that it has the jurisdiction to regulate the radioactive components of mixed waste. As indicated in the Fact Sheet

¹ For example, the phrase “radioactive component of mixed waste” as used by the Permittees could include radioactive components that are not source, special nuclear or byproduct material so that the Atomic Energy Act does not preempt state regulatory authority. Moreover, the state has incidental authority over radionuclides. *United States v. State of New Mexico*, 32 F.3d 494 (10th Cir. 1994).

issued by NMED on November 26, 2003, NMED proposes to add language to the WIPP permit that states:

“II.C.3.i. Documented waste inventory – *mixed wastes* that are not directly traceable to waste streams in the "Transuranic Waste Baseline Inventory Report (Revision 2)", DOE/CAO-95-1121, December 1995, are not acceptable at WIPP unless specifically approved and listed in Table II.C.3.i below.” (Italics added.)
[Table not shown]

In addition, NMED proposes to add language in Permit Attachment B that states:

“*mixed wastes* that are not directly traceable to waste streams in the "Transuranic Waste Baseline Inventory Report (Revision 2)", DOE/CAO-95-1121, December 1995, are not acceptable at WIPP unless specifically approved and listed in Module II.” (Italics added.)

As this language shows, the actual proposed modification prohibits the disposal of “mixed wastes” that are not directly traceable to waste streams in the “Transuranic Waste Baseline Inventory Report (Revision 2)” (TWBIR) and does not attempt to change the regulatory scheme for non-mixed radioactive wastes. Because the term “mixed waste” includes hazardous waste or other waste the regulation of which has not been preempted by federal law, NMED has jurisdiction.

NMED does not know exactly what mixed waste the Permittees plan to dispose of at WIPP in the future – indeed that is the reason for the proposed modification. The Permittees now proposed to dispose of mixed wastes that were not in the inventory report referred to in the application. By law, DOE was required in the permit application process to indicate to the state the composition, quantity and concentrations of hazardous waste that would be disposed. NMSA 1978 Section 74-4-4.2 A(1). NMED asserts regulatory authority only over the hazardous component of those mixed wastes and does

not assert jurisdiction over any radiological component that has been preempted by federal law. As such, the state has the authority to prohibit the introduction of waste into WIPP that does not meet the requirements of the Hazardous Waste Permit as it is proposed to be modified.

The Permittees argue that the Fact Sheet issued by NMED on November 26, 2003 focuses not on hazardous waste constituents but on the radiological classification of the waste. Motion to Dismiss, p. 5. While the Fact Sheet indicates that NMED has a concern about high-level tank waste, the concern is not necessarily with the radiological constituents contained in such waste. The Fact Sheet makes clear that NMED seeks to prohibit the disposal of “waste” that was not included in the TWBIR because it was not proposed by the Permittees for disposal and was not contemplated, analyzed or reviewed by NMED when the original permit was issued. Additionally, it has not been evaluated by the state for compatibility with TRU mixed waste or for other characteristics that may make disposal at WIPP a danger to public health or the environment. Fact Sheet, p. 4. Thus NMED is not attempting to regulate a radioactive component of mixed waste – it is attempting to regulate the disposal of any waste over which it has jurisdiction to assure that there is no danger to public health or the environment. Sections 74-4-4.2C, 74-4-4.2H.

The Permittees argue that although the permit modification is “couched in the guise” of being based on the TWBIR, the “actual goal” is to regulate the radiological portion of the waste that may be disposed of at WIPP. Motion to Dismiss, p. 5. First, the Permittees’ are apparently disputing the facts alleged by NMED as the basis for the permit modification, and such arguments are inappropriate in a motion to dismiss. As the

Permittees recognize, a motion to dismiss assumes the factual contentions are true, and tests the legal sufficiency of the claim. Motion to Dismiss, p. 2. The Permittees should therefore not be heard in its motion to argue about a factual matter based on their misperception of the "actual goals" of NMED.

Second, the Permittees are wrong on the facts. The "actual goal" of the proposed permit modification is to prohibit mixed wastes that were not included in the TWBIR from being disposed of at WIPP because they have not been properly evaluated for disposal at WIPP. The Permittees' jurisdictional argument is premised upon its misunderstanding of the facts, and as such, it must fail.

B. The Agency Initiated Permit Modification Meets the Requirements of 40 CFR 270.41.

The Permittees are correct that NMED is invoking 40 CFR §270.41 in this agency initiated permit modification. That section states in relevant part:

§ 270.41 Modification or revocation and reissuance of permits. When the Director receives any information ... he or she may determine whether one or more of the causes listed in paragraphs (a) and (b) of this section for modification, or revocation and reissuance or both exist. If cause exists, the Director may modify or revoke and reissue the permit accordingly, subject to the limitations of paragraph (c) of this section....

(a) Causes for modification. The following are causes for modification, but not revocation and reissuance, of permits...

(2) Information. The Director has received information. Permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance (other than revised regulations, guidance, or test methods) and would have justified the application of different permit conditions at the time of issuance.

In this case, NMED has received new information. This was explicitly set forth in the agency's Fact Sheet issued on November 26, 2003. The "new information" is that

DOE intends to dispose of waste at WIPP that was not contemplated by the TWBIR and was not contemplated, analyzed or reviewed by NMED when the original permit was issued. NMED also contends that the information was not available at the time of the permit issuance and that the information, had it been available, would have justified the application of different permit conditions at the time of issuance.

i) NMED's New Information Was Not Available At The Time Of Permit Issuance.

WIPP was granted its Hazardous Waste Facility Permit on October 27, 1999. The last revision of the permit application (Application, Rev. 6)² submitted by the Permittees for the WIPP permit, in describing the waste that would be transported to and disposed at WIPP, relied upon the "WIPP Transuranic Waste Baseline Inventory Report (Revision 1)", DOE/CAO-94-1005, February 1995 (WTWBIR Rev. 1)³. The WTWBIR Rev. 1 was an inventory of all transuranic (TRU) waste that was expected to be disposed of at WIPP, and was in compliance with a provision in the WIPP Land Withdrawal Act, 102 P.L. 579 (1992) that required DOE to complete "a survey identifying all transuranic waste types at all sites from which wastes are to be shipped to WIPP..." It also served the purpose of providing NMED with a description of the inventory of TRU waste that was to be disposed of at WIPP for purposes of any analyses that had to be performed to support the permit, including providing NMED with waste stream descriptions as estimates of anticipated hazardous constituents. The waste analysis plan (WAP) in the permit application (Chapter C) included a complete list of TRU mixed waste streams from the

² Revision 6.0 was submitted on April 12, 1996. Subsequently, DOE made various further minor revisions, up through Revision 6.5, submitted in November of 1997, that did not change any of the references to the WTWBIR Rev. 1.

³ The WTWBIR Rev. 1 was later revised to include non-defense wastes that were not expected to be disposed at WIPP, so the report was renamed to remove the designation of "WIPP TWBIR and became the TWBIR Rev. 2.

WTWBIR Rev.1 in the form of a waste identifier cross-correlation table (Table C-1) and a table of contact-handled TRU mixed waste characterization information (Table C-2). The WTWBIR Rev.1 was used as a basis to identify potential incompatibilities for all defense generated TRU mixed waste to ensure that WIPP would manage only compatible waste (Appendix C1). In addition, the WTWBIR Rev.1 was used by DOE in its permit application to apply weighting factors to the data accumulated from preliminary headspace gas analyses to reflect the expected proportions of different waste types and to predict the emissions of volatile organic compounds from the emplacement of waste at WIPP (Appendices C2, D9, D13).

The fact that the permit relies upon specific waste streams identified in the WTWBIR Rev. 1 is highlighted by the permit requirement that, for every waste stream disposed of at WIPP, the description of the waste stream from the WTWBIR must be provided on a Waste Stream Profile Form prior to disposal. Permit Attachment B, Section B-1d, "Control of Waste Acceptance" and Figure B-1, "WIPP Waste Stream Profile Form".

Prior to the HWFP being issued to the Permittees, DOE prepared a revision to the WTWBIR Rev. 1 that included non-defense generated TRU waste. This document is the "Transuranic Waste Baseline Inventory Report, (Revision 2)" DOE/CAO-95-1121, December 1995 (TWBIR). While this document was not referenced or relied upon in the WIPP permit application, it was prepared by DOE prior to the issuance of the permit in 1999.

DOE has now indicated that it intends to dispose of mixed waste at WIPP that was not identified in the WTWBIR Rev.1. Nor was the waste specifically identified in

the TWBIR waste profiles or included in the Transuranic Waste Baseline Inventory Database. Information regarding waste streams not identified in the TWBIR is obviously “new information” that can be used by NMED for an agency initiated modification. The speculative statements in the TWBIR regarding “possible future WIPP waste”, which was not referred to, used or relied upon in the permit application, not only are insufficient under Section 74-4-4.2A(1), but are not sufficient to prevent NMED from initiating a permit modification based on new information now that DOE is undertaking to dispose of wastes that were not in the waste inventory used by DOE to support its original permit application.

Even if, based upon speculative statements in the TWBIR, NMED was somehow on notice that mixed wastes not traceable to the inventory report would be disposed of at WIPP, this does not prevent NMED from using new information to initiate a permit modification. In the case of *In Re Delco Remy, Anderson, Indiana*, 7 EAD 136 (1997) (*Delco*), EPA Region V issued a permit modification to the GMC Delco Remy (GMC) RCRA permit in Anderson, Indiana. GMC appealed on the basis that its permit had already expired, but also intimated that the modification was inappropriate because EPA Region V knew that more information would be forthcoming about particular solid waste management units (SWMUs) after the permit was issued. The EPA Environmental Appeal Board stated that the fact that a permit contemplated new information would not prohibit modifications under §270.41 based upon that new information. In fact, the Board expressly stated that even if the Region had knowledge about the existence of potential new information at the time the initial permit was issued, that would not

preclude a modification under §270.41 once there is additional information prompting action. *Id.*, F.N. 17. The Board stated:

“The closest that GMC comes to a denial on this point is to imply in its Reply, at 13, that if EPA had knowledge of the existence of a SWMU site, then the regulations addressing new knowledge cannot be invoked for that SWMU. **This is incorrect. Knowing about a SWMU does not mean that there cannot be additional information about that SWMU prompting further action.**” (Emphasis added.)

The *Delco* case supports the position that while the state may have known in general at the time of permit issuance that some unidentified waste could in the future be classified as TRU waste, a permit modification can still be accomplished under §270.41 when more specific information becomes available.

ii) **NMED’s New Information, Had It Been Known At The Time Of The Original Permit Application, Would Have Justified The Application Of Different Permit Conditions At The Time Of Issuance.**

The Permittees argue that even if the information relied upon by NMED to justify the agency initiated permit modification is new, it would not have justified the imposition of a permit condition had it been known at the time of the initial permitting action. Again, the Permittees are wrong. The permit that was issued by NMED to the Permittees relied upon the information and analyses performed by DOE on the expected waste streams contained in the Application Rev. 6 and WTWBIR Rev. 1. Clearly, had the Permittees informed NMED that it was planning to dispose of other waste streams, for which little or no chemical information was available, NMED would have been fully justified in limiting disposal to those waste streams that were in the WTWBIR and that had been used as the basis for analysis.

The situation is similar to the permit condition that currently prohibits the storage, management, or disposal of Remote-Handled (RH) TRU waste at WIPP. At the time of the original permitting action, the Applicants sought the ability to dispose of RH TRU waste at WIPP. It became evident during the permitting process that the methods and procedures for characterization, management and disposal were inadequately developed. The Applicants did not have sufficient information about how RH TRU waste would be managed and characterized, so NMED imposed a condition in the permit to prohibit the disposal of RH TRU waste until adequate management and characterization methods and procedures could be developed and implemented through a permit modification. The Hearing Officer's Report contained the following findings:

Finding No. 202: The WAP, the QAPP and the TRU Waste Characterization Sampling and Analysis Methods Manual, as currently written, apply only to contact-handled ("CH") TRU waste⁴ and do not apply to remote-handled ("RH") TRU waste. Tr. 880-81 (R. Neill); RP Nos. 15, 36 (comment 167). Applicants have not provided sufficient information regarding procedures to characterize RH TRU waste in response to prior requests and notices of NMED. Tr. 2377-78 (S. Zappe).

Finding No. 203: Applicants concede that a permit modification must be obtained to add RH TRU mixed waste characterization methods in order to manage, store, and dispose RH TRU mixed waste at WIPP. RP Nos. 15, 36 (comment 177); Applicants' Closing Argument and Memorandum, pg. M6 (June 25, 1999).

As with RH TRU wastes, NMED does not have adequate information, and has not performed adequate evaluations of the non-WTBIR Rev. 1 wastes to determine that the wastes should be allowed at WIPP. While NMED is now aware that the Permittees have

⁴ CH TRU waste is TRU waste with a surface dose rate not greater than 200 millirem per hour. RP 1 (Fact Sheet, pg. 1); Proposed Final Permit of June 25, 1999 (Module I.D.1).

embarked on a plan to dispose of these non-WTWBIR Rev. 1 waste streams at WIPP, the Permittees have not demonstrated that characterization methods and procedures are adequate or sufficiently well developed to allow disposal at WIPP. Given this new information, NMED can and should impose a permit condition prohibiting non-TWBIR waste until such time as the Permittees request a permit modification and demonstrate that the waste streams have been sufficiently analyzed and that its proposed methods and procedures for characterization are adequate.

No doubt, the Permittees will attempt to provide evidence in this proceeding that its proposed new waste streams are compatible and can be adequately characterized. However, this is not the proceeding in which such information should be developed. That information should have been submitted with the original permit application, or to the extent that it could not have been because it is based on new studies and information, it should serve as the basis for a future permit modification initiated by the Permittees. This proceeding is for the purpose of evaluating the NMED initiated modification, and whether the new information relied upon by the agency justifies imposition of a new permit condition, not for the purpose of considering new studies and evidence to support the disposal of new waste streams at WIPP.

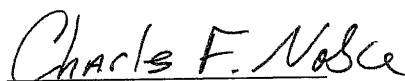
II. CONCLUSION

The Motion to Dismiss should be denied on the basis that its arguments do not assume the facts as alleged, and therefore is procedurally defective. On the merits, NMED is simply asserting jurisdiction over hazardous waste and mixed waste. It clearly has jurisdiction because it is not attempting to exercise jurisdiction over radiological

components of mixed waste. In addition, NMED meets the requirements of §270.41, because its proposed modification is based on new information and that information would have justified a permit condition if known at the time of issuance of the permit.

Respectfully submitted,

NEW MEXICO ENVIRONMENT DEPT.



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**STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT**

**IN THE MATTER OF THE AGENCY
INITIATED MODIFICATION OF THE
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FOR THE WASTE ISOLATION PILOT PLANT
CARLSBAD, NEW MEXICO
EPA ID NO. NM4890139088**

No. HWB 04-01 (M)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Motion to Dismiss was sent via first class mail on April 12, 2004 to the following:

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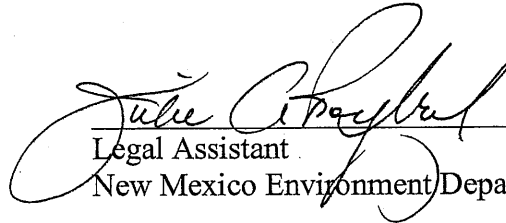
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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF ENVIRONMENT



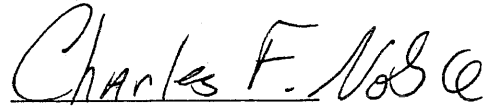
CONCERNING INTENT TO APPROVE)
AN AGENCY-INITIATED MODIFICATION)
TO THE HAZARDOUS WASTE FACILITY) HWB 04-01 (M)
PERMIT FOR THE WASTE ISOLATION)
PILOT PLANT, CARLSBAD, NEW MEXICO)

NEW MEXICO ENVIRONMENT DEPARTMENT
HAZARDOUS WASTE BUREAU
NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY

1. On November 26, 2003, the State of New Mexico Environment Department issued a Notice of Public Comment Period and Public Hearing in this matter. The Department gave notice that a hearing would be held beginning April 6, 2004, and that any persons who wish to present technical oral comment must file a Notice of Intent to Present Technical Testimony on or before March 8, 2004.
2. Person/entity: The New Mexico Environment Department, Hazardous Waste Bureau hereby states its intent to present technical testimony.
3. Position: The New Mexico Environment Department, Hazardous Waste Bureau, supports the draft permit issued by the Department as modified by the Southwest Research and Information Center in their comments filed January 30, 2004.
 - a. Witnesses: The New Mexico Environment Department, Hazardous Waste Bureau, will present the witness as described on Attachment A hereto.
4. Length of Testimony: It is expected that the direct testimony of the witness will last approximately 1 hour. It is unknown how long cross-examination by other parties will take.

5. Exhibits: All materials and exhibits relied upon by NMED witnesses will stem from the Administrative Record in this matter and publicly available materials and documents, including the Administrative Record for the original Permit issuance. No additional specific exhibits have been identified at this time, but NMED's Hazardous Waste Bureau reserves the right to identify further exhibits based upon the notices of intent filed by other parties, such as information obtained from the WIPP Waste Information System (WWIS) database.
6. Technical Materials: None, other than the information that is part of the Administrative Record.
7. Direct Testimony: A summary of the direct testimony of the witness is attached hereto as Attachment A.

Respectfully submitted,

A handwritten signature in cursive script that reads "Charles F. Noble".

Charles F. Noble
Assistant General Counsel

ATTACHMENT A

NMED Hazardous Waste Bureau Witness List

Witness #1

Name and address of witness:

Steve Zappe
NMED Hazardous Waste Bureau
2905 Rodeo Park Drive East, Bldg. 1
Santa Fe, NM 87505

Witness qualifications:

Mr. Zappe is currently a Staff Manager with the State of New Mexico in NMED's Hazardous Waste Bureau (HWB). Mr. Zappe has worked for HWB since 1994, serving as the WIPP permit writer through the initial 1999 WIPP public hearing on the original permit issuance. He currently serves as NMED's WIPP Project Leader, supervising a staff of three. Mr. Zappe holds a Bachelor of Science degree in Physics from California State University, Fresno, and a Master of Science degree in Geological Science from the University of California, Riverside.

The witness will testify to the following:

Mr. Zappe will summarize the administrative history of the permit in a manner consistent with the Fact Sheet issued November 26, 2003.

Mr. Zappe will summarize the draft permit modification released by NMED, including the basis and rationale for the conditions that NMED imposed in the draft permit modification. This testimony will also be consistent with the Fact Sheet issued November 26, 2003.

Mr. Zappe will summarize his understanding of all comments received on the draft permit. Mr. Zappe will also provide NMED's general response to many of the general issues raised in public comment received to date.

Mr. Zappe will summarize NMED's position that the proposed modification meets the regulatory standard for agency-initiated modifications specified in 20.4.1.900 NMAC (incorporating 40 CFR §270.41(a)(2)). Specifically, Mr. Zappe will present evidence that information which provides adequate cause for modification of the permit was not available at the time of permit issuance, and that such information would have justified the application of different permit conditions at the time of issuance of the original permit.

Mr. Zappe will present testimony related to the following assertions by the Permittees:

1. That more than 12,000 drum equivalents of waste from eight waste streams have been disposed of in the WIPP repository that are not directly traceable to the TWBIR.

2. That imposing the proposed permit modification is inconsistent with NMED's oral and written testimony at the original permit hearing or inconsistent with the hearing officer's report.
3. That the notification in the TWBIR regarding possible future TRU waste and the changing nature of the TWBIR preclude NMED from identifying any future information as "new" information.
4. That the information relied upon by NMED as the basis for the permit modification is not the type of information that would require or authorize an agency-initiated modification under 40 CFR §270.41(a).
5. That the proposed modification is outside the State's regulatory authority over WIPP.
6. That Section 311 of the 2004 Energy and Water Development Appropriates Act (Pub. L. 108-137) preempts NMED's authority to impose the conditions proposed in this permit modification.